

§ 331.4

Where the permit decision being appealed was made by the division engineer or higher authority, a Corps official at least one level higher than the decision-maker shall make the decision on the merits of the RFA, and this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General.* (1) *Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision-making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially-promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

§331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on an appealable action. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAP fact sheet. For declined permits (*i.e.*, proffered individual permits that the applicant refuses to accept and sends back to the

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Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

§331.5 Criteria.

(a) *Criteria for Appeal.* (1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at §331.2) to the appropriate division office in order to appeal a permit denial, or a declined individual permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of a permit denial, or a declined individual permit, must be specifically stated in the RFA, and must be more than a simple request for appeal because the affected party did not like the permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: a procedural error, an incorrect application of law, regulation or officially-promulgated policy, omission of material fact, incorrect application of the Section 404(b)(1) Guidelines, or use of incorrect data.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under these regulations if it falls into one or more of the following categories:

(1) An individual permit decision (including a letter of permission or an individual permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all right to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;

(2) Any site specific matter that has been the subject of a final decision of the Federal courts;

(3) A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision;

(4) A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision-maker (e.g., the requirements of a binding statute, regulation, state Section 401 water quality certification, state Coastal Zone Management Act disapproval, etc. (See 33 CFR 320.4(j));

(5) A permit denial case where the applicant has subsequently modified the proposed project, because this would constitute an amended application that would require a new public interest review, rather than an appeal of the existing record and decision; or

(6) Any request for the appeal of a denied permit or a declined individual permit, where the RFA has not been received by the division engineer within 60 days of the date of the NAP.

§ 331.6 Filing an appeal.

(a) An affected party appealing a permit denial or declined permit must submit an RFA that is received by the division engineer within 60 days of the date of the NAP. A flow chart of the appeal process is shown in Appendix A.

(b) In the case where an applicant objects to a proffered individual permit, the appeal process proceeds as follows. To initiate the appeal process regarding the terms and conditions of the permit, the applicant must write a letter to the district engineer explaining his objections to the permit. The district engineer, upon evaluation of the applicant's objections, may: modify the permit to address all of the applicant's objections, or modify the permit to address some, but not all, of the applicant's objections, or not modify the permit, having determined that the permit should be issued as previously written. In the event that the district engineer agrees to modify the proffered individual permit to address all of the applicant's objections, the district engineer will issue such modified permit, enclosing an NAP form as well. Should the district engineer modify the proffered individual permit to address

some, but not all, of the applicant's objections, the district engineer will send the applicant such modified permit, an NAP form, and the decision document for the project. If the district engineer does not modify the proffered individual permit, the district engineer will offer the unmodified permit to the applicant a second time, enclosing an NAP form and a copy of the decision document. If the applicant still has objections, the applicant may decline such modified or unmodified permit; this declined individual permit may be appealed to the division engineer upon submittal of a complete RFA form. The completed RFA must be received by the division engineer within 60 days of the NAP. A flow chart of an applicant's options for a proffered individual permit is shown in Appendix B.

(c) The district engineer may not delegate his signature authority to deny the permit with prejudice, or to return an individual permit to the applicant with unresolved objections (see §§ 331.6 (b)(ii) and 331.6(b)(iii)).

(d) Affected parties may appeal permit denials or declined individual permits where the permit denial or the proffered individual permit occurs after March 9, 1999, but may not appeal permit denials or declined permits where the Corps took that action before March 9, 1999. All appeals must meet the criteria set forth in § 331.5 of this Part.

§ 331.7 Review procedures.

(a) *General.* The administrative appeal process for permit denials and declined individual permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the RO. The RO will document the appeal process, and assist the division engineer to make a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

(b) *Requests for the appeal of permit denials or declined individual permits.* Upon